

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE FOR THE TWENTIETH
JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE,
Petitioner,

v.

CORDOVA ATHLETIC CLUB, a Tennessee
Limited Liability Company,

Respondent.

ASSURANCE OF VOLUNTARY COMPLIANCE

THIS ASSURANCE OF VOLUNTARY COMPLIANCE ("Assurance") is given by Respondent, Cordova Athletic Club, LLC of Cordova, Tennessee, to Paul G. Summers, Attorney General and Reporter for the State of Tennessee ("Attorney General"), and to Mark Williams, Director of the Tennessee Division of Consumer Affairs of the Department of Commerce and Insurance (ADivision@).

WITNESSETH:

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division and the Attorney General have conducted an investigation of certain business practices of Respondent. This investigation was limited to the practice of operating a health club without a valid certificate of registration from the Division. As a result of the investigation, the Division and the Attorney General have determined that Respondent has violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.* and the Tennessee Health Club Act, Tenn. Code Ann. §§ 47-18-301, *et seq.*

B. This Assurance addresses only Respondent's practice of operating a health club without a valid certificate of registration from the Division. The Assurance does not resolve any other issues not connected with operating a health club without certified registration.

C. Respondent neither admits nor denies any wrongdoing. Pursuant to Tenn. Code Ann. § 47-18-107(a), entering into an Assurance shall not be considered an admission of a prior violation of the Tennessee Consumer Protection Act of 1977.

D. Pursuant to Tenn. Code Ann. § 47-18-107, Respondent desires to give this Assurance, and the Attorney General desires to accept it, in order to avoid the costs and expense of litigation.

NOW, THEREFORE, acting pursuant to Tenn. Code Ann. § 47-18-107, Respondent gives, and the Attorney General accepts, the following assurances:

I. DEFINITIONS

1.1 As used in this Assurance and accompanying Agreed Order, the following words or terms shall have the following meanings:

A. Assurance of Voluntary Compliance@ or Assurance@ shall refer to this document entitled Assurance of Voluntary Compliance in the matter of *State of Tennessee v. Cordova Athletic Club, a Tennessee Limited Liability Company*.

B. AConsumer@ means any person, a natural person, individual, governmental agency, partnership, corporation, trust, estate, incorporated or unincorporated association, and any other legal or commercial entity however organized.

C. ADivision@ or ADivision of Consumer Affairs@ shall refer to the Tennessee Division of Consumer Affairs of the Department of

Commerce and Insurance.

D. ARespondent@ shall refer to Cordova Athletic Club, LLC and/or any and all officers, owners, employees, authorized agents and representatives of Cordova Athletic Club, LLC.

E. APetitioner@, AState of Tennessee@, or AAttorney General@ shall refer to the Tennessee Attorney General & Reporter and the Office of the Tennessee Attorney General.

F. ATennessee Consumer Protection Act@ or AConsumer Act@ shall refer to the Tennessee Consumer Protection Act of 1977 and related statutes found at Tenn. Code Ann. §§ 47-18-101, *et seq.*

G. ATennessee Health Club Act@ or AHealth Club Act@ shall refer to the statutes relating to the health clubs found at Tenn. Code Ann. § 47-18-301, *et seq.*

H. AUnenforceable Health Club Agreements@ shall refer to those health club agreements existing or entered into by consumers and Respondent during the period of time that Respondent did not have a certificate of registration from the Division of Consumer Affairs (prior to March 2, 1999). AUnenforceable Health Club Agreements@ shall also include any health club agreements

existing or entered into by consumers and Respondent during any future periods of time during which Respondent fails to maintain a certificate of registration.

II. JURISDICTION

2.1 The parties agree that the Chancery Court of Davidson County, Tennessee has jurisdiction over the subject matter of this case and over Respondent for the purposes of entering this Assurance and the accompanying Agreed Order. Jurisdiction is retained by the Court for the purpose of enabling the State to apply to the Court for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance and the accompanying Agreed Order, including the enforcement or compliance therewith and penalties for violation thereof. Pursuant to Tenn. Code Ann. § 47-18-107(d), the State may reopen this Assurance at any time. Respondent agrees to pay all court costs and reasonable attorneys' fees associated with any successful petitions to enforce any provision of this Assurance and the accompanying Agreed Order against Respondent.

III. VENUE

3.1 Pursuant to Tenn. Code Ann. § 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Chancery Court of Davidson County, Tennessee.

IV. PARTIES

4.1 Respondent Cordova Athletic Club, LLC warrants and represents that it is the proper party to this Assurance. Respondent further acknowledges that it understands the State expressly relies on this representation and warranty, and that if it is inaccurate, may move to vacate or set aside this Assurance,

or may request that Respondent be held in contempt.

4.2 This Assurance shall apply to Respondent whether acting through any corporation, subsidiary, affiliate, division or other device or through any officer, director, employee, agent successor, assign or any other person acting in concert or participating with them in an official capacity.

V. PERMANENT INJUNCTION

It is hereby agreed upon approval of the Court, that Respondent shall be permanently and forever, enjoined and bound from directly or indirectly engaging in any of the practices set forth herein:

5.1 Failing to abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, *et seq.*, including, but not limited to, the sections of the Act regulating health clubs, Tenn. Code Ann. §§ 47-18-301 *et seq.*, (Athe Health Club Act@).

5.2 Operating a health club unless registered with the Division pursuant to Tenn. Code Ann. § 47-18-302. Further, for the duration of Respondent's operation of a Ahealth club@ pursuant to Tenn. Code § 47-18-301, Respondent shall timely renew the certificate of registration with the Division prior to the expiration of a valid registration.

5.3 Representing or implying to consumers that health club agreements are enforceable against consumers when such agreements are unenforceable pursuant to Tenn. Code Ann. § 47-18-303.

5.4 Taking collection action against any consumer that entered into a health club agreement while the health club was unregistered.

5.5 Causing any negative entries to be placed on a consumer's credit history or record, if the consumer entered into a health club agreement during the time period that Respondent's health club was unregistered. Further, Respondent shall use its best effort to correct any consumer's credit history or record on which Respondent placed negative entries if the health club agreement was entered into while the health club was unregistered.

5.6 Failing to withdraw any consumer's unenforceable health club agreement from any third parties holding such accounts for purposes of collection.

VI. HEALTH CLUB AGREEMENTS/RESTITUTION

6.1 Respondent shall permit all consumers to cancel any unenforceable membership agreements and receive a refund, as set forth herein, of that portion of any down payment, enrollment fee, membership fee, or other fee that does not represent payment for actual use of the facilities and for goods and services

actually provided.

6.2 If any consumers with unenforceable membership agreements indicate to Respondent that they might want to cancel their health club agreement for any reason, then Respondent shall inform such consumer of their right to do so pursuant to this Assurance. Specifically, any such consumer shall be provided the notices set forth below.

6.3 Within five (5) days of learning in writing that a consumer may want to cancel their unenforceable health club agreement, the Respondent shall mail the letter attached as Exhibit A, printed on Cordova Athletic Club, LLC letterhead, along with the Membership Agreement Cancellation Form, attached as Exhibit B. The letter offers the opportunity to obtain a full monetary refund of the entire purchase price of the health club agreement or cancellation of debt, less that portion actually used, if the consumer desires to cancel their health club agreement for any reason. (For the purpose of this Assurance, the purchase price shall include all deposits, fees, taxes and any other charges regardless of the identifying term for such charge which was incurred by the consumer.) No other materials, including promotional materials, may be included with the mailing of Exhibits A and B.

6.4 All consumers who submit a cancellation form to the Division of Consumer Affairs will receive a full monetary refund for the purchase price of the health club agreement or cancellation of debt, less that portion actually used. All cancellation requests will be honored regardless of whether they are received by the Respondent or any agency of the State.

6.5 Within thirty (30) days of Respondent's receipt of completed cancellation notices from the Division of Consumer Affairs, Respondent shall provide a Notice, (Exhibit C1 if the consumer is entitled to a refund and Exhibit C2 if the consumer is not entitled to a refund), along with any refund due to each consumer who returned a membership cancellation agreement form. Respondent shall be required to comply with the terms of the Notice. No other materials, including promotional materials, may be included with the mailing of Exhibits C1 and C2.

6.6 The materials required by this section must be mailed via certified first class postage paid mail through the United States Postal Service. The mailing must be sent in Cordova Athletic Club, LLC letterhead envelopes. All envelopes must be clearly marked APOSTMASTER: ADDRESS CORRECTION REQUESTED@ and IMPORTANT INFORMATION REGARDING CANCELING YOUR HEALTH CLUB AGREEMENT AND IF APPLICABLE, A REFUND.@ In the event any envelope is returned with a corrected or forwarding address, Respondent shall again re-mail such correspondence to the consumer via certified mail through the United States Postal Service at the correct address. No other materials, including promotional materials, may be included with the re-mailing of correspondences to consumers. The Division of Consumer Affairs shall receive written notification of the name, corrected address and date of mailing the second notification to any consumer within five (5) days of mailing the second correspondence.

6.7 Consumer refunds shall be made by check drawn on an account with a sufficient cash balance to fund

all refunds and shall not consist of credits, discounts or other partial reimbursement of the purchase price. All consumer refunds shall be mailed by first class certified postage paid United States Mail. Refunds shall be re-mailed with an address correction, where applicable.

6.8 In the event that the Respondent is unable to locate a consumer after the consumer has requested a refund, those funds due such consumer shall be treated as unclaimed property in the possession of the State of Tennessee pursuant to the Uniform Disposition of Unclaimed Property Act, Tenn. Code Ann. §§ 66-29-101, *et seq.* These funds may be delivered to the Treasurer prior to the statutory due date. The Respondent shall provide a report to the Attorney General & Reporter within six (6) months of the entry of the Assurance which details the amounts delivered to the Treasurer for treatment as unclaimed property under the State statute. The Respondent shall continue to provide this information every six (6) months until all funds have been claimed ending March 30, 2000. The Respondent shall provide all information necessary to the State Treasurer's Office to appropriately handle such funds as unclaimed property as set forth by statute and regulation.

6.9 Respondent is responsible for all costs associated with the refund process set forth in section 6, including, but not limited to, all costs associated with mailing, all letterhead, envelopes, copying charges, postage and other costs associated with the issuance of refund checks.

6.10 Respondent shall, sixty (60) days after entry of this Assurance and thereafter within three (3) weeks as additional consumers are identified, provide a report to the State certifying and verifying that it has complied with the provisions of this Assurance regarding cancellation of agreements and payment of restitution. This report shall alphabetically list the name and address of each consumer who canceled an agreement, and the amount paid to each consumer who received restitution, the amount of the canceled debt, and the total of all refunds and canceled debt for all consumers. At the same time the sixty (60) day report is provided,

Respondent shall also provide an affidavit from the person responsible for preparing the list certifying and verifying that the information is true and correct to the best of their knowledge and that Respondent fully complied with all restitution requirements of this Assurance.

6.11 The State may ask Respondent to provide proof that reimbursement was made to particular consumers, as well as verification that the amount of reimbursement provided was accurate. Respondent shall have one (1) week to respond to such a request. Respondent shall retain proof of payment for eighteen (18) months after the restitution process is concluded.

6.12 If Respondent has attempted to collect money from any consumers who entered into a health club agreement during the time that Respondent was unregistered and any collection action was taken by Respondent or any agent or employee of Respondent that could or did negatively impact on the consumer's credit history, Respondent shall immediately, and in no event later than ten (10) days from the date of entry of this Assurance, take steps necessary to cease all collection activities and to reverse any adverse effects on the consumer's credit.

6.13 Nothing herein restricts the applicability of Tenn. Code Ann. § 47-18-303 making contracts unenforceable if entered into under the terms set forth therein. Any consumer may cancel such contract and receive a refund if the consumer entered into a health club agreement under the conditions set forth in that statute.

VII. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

7.1 Pursuant to Tenn. Code Ann. § 47-18-108(b)(4), Respondent shall pay the sum of One Thousand Five Hundred Dollars and No/100 (\$1,500.00) to the State of Tennessee to reimburse the State for attorneys' fees and costs of investigation, prosecution and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Respondent shall provide a certified or cashier's check to the Attorney General or his designated representative payable to the AState of Tennessee - Attorney General@ on the day of execution of this Assurance.

VIII. CIVIL PENALTIES

8.1 Pursuant to Tenn. Code Ann. § 47-18-108(b)(3), Respondent shall pay a civil penalty of One Hundred Dollars (\$100.00) for every full month that Respondent operated without registration from the Division. Respondent certifies that, as of the date of this Assurance, Respondent has operated a health club without registration for twenty six (26) full months. Respondent shall therefore pay the sum of Twenty Six Hundred Dollars (\$2,600.00) to the State of Tennessee as civil penalties for Respondent's violations of the Tennessee Health Club Act. This payment shall be made by a cashier's or certified check to the Attorney General or his designated representative payable to the AState of Tennessee - Civil Penalty@ on the date of execution of this Assurance. The State expressly relies upon Respondent's representation regarding the number of months that they have been operating without registration, and if this representation is false or misleading the State may move to vacate or set aside this Assurance or request that Respondent be held in contempt.

IX. MONITORING AND COMPLIANCE

9.1 Upon request, Respondent agrees to provide books, records and documents to the State at any time, and to informally, or formally under oath, provide other information and/or testimony to the State relating to compliance with this Assurance. Respondent shall make any requested information available within ten days of the request at the Office of the Attorney General, 425 Fifth Avenue North, Nashville,

Tennessee or at such other location as is agreeable in writing to Respondent and the Attorney General. This section shall in no way limit the Attorney General's or the Division's right to obtain documents, information or testimony pursuant to any federal or state law, regulation or rule.

9.2 The State of Tennessee has the right to test shop Respondent's health club for the purpose of confirming compliance with this Assurance and state law. The test shoppers are not required to disclose that they are representatives of the State of Tennessee when making contact with Respondent. Further, the State of Tennessee may record any or all aspects of any in person visit(s) to Respondent's stores in audio or video form without notice to Respondent.

X. PRIVATE RIGHT OF ACTION

10.1 Pursuant to Tenn. Code Ann. §§ 47-18-109 and 47-18-107(e), nothing in this Assurance shall be construed to affect any private right of action that a consumer or other person may hold against Respondent.

XI. PENALTY FOR FAILURE TO COMPLY

11.1 Respondent acknowledges Tenn. Code Ann. § 47-18-107(c) which states in pertinent part,

...unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of the assurance is prima facie evidence of a violation of [the Tennessee Consumer Protection Act].

11.2 Pursuant to Tenn. Code Ann. § 47-18-107(f) Respondent understands that any knowing violation of the terms of this Assurance is punishable by civil penalties of not more than One Thousand Dollars (\$1,000.00) for each violation, in addition to any other appropriate sanctions, including, but not limited to, contempt sanctions and the imposition of reasonable attorneys' fees and costs. Respondent agrees to pay all court costs and reasonable attorneys' fees associated with any successful petitions to enforce this Assurance and Agreed Order against Respondent.

XII. ADDITIONAL REPRESENTATIONS AND WARRANTIES

12.1 Neither Respondent nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General, the Division, or any other governmental unit of the State of Tennessee has approved, sanctioned, or authorized any practice, act, or conduct of the Respondent.

12.2 The parties represent and warrant, each to the other, that the execution and delivery of this Assurance is their free and voluntary act, that this Assurance is the result of good faith negotiations, and that the parties believe that the terms of this Assurance are fair and reasonable. The parties warrant that they will implement the terms of this Assurance in good faith. Further, no offer, agreements, or inducements of any nature whatsoever have been made to it by the State of Tennessee, its attorneys or any employees of the Attorney General's Office or the Division of Consumer Affairs to procure this Assurance.

12.3 Respondent represents that the signatories to this Assurance have authority to act for and bind Respondent.

12.4 Respondent shall not participate, directly or indirectly, in any activity to form a separate entity for the purpose of engaging in acts set forth and prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance or the spirit of this Assurance.

12.5 Acceptance of this Assurance by the State shall not be deemed approval by the State of any of Respondent's business practices.

12.6 Within thirty (30) days of the entry of this Assurance, Respondent shall submit a copy of this Assurance to each of their employees, officers and directors. Within sixty (60) days, Respondent shall provide a certification to the State that the Assurance has been provided to necessary parties.

12.7 Cordova Athletic Club, LLC represents that it is the proper party to enter into this Assurance and the accompanying Agreed Order. Respondent further acknowledges that the State expressly relies upon this representation and warranty, and if it is false, misleading, deceptive, unfair, or inaccurate, the State has the right to move to vacate or set aside this Assurance and Agreed Order, and request that Respondent be held in contempt if the State so elects.

12.8 This Assurance and the accompanying Agreed Order may only be enforced by the parties hereto.

12.9 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

12.10 This Assurance and the accompanying Agreed Order constitute the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition. This Assurance is limited to resolving only matters set forth in the State's Petition.

12.11 This Assurance shall be binding and effective against Respondent upon both parties signing the

Assurance. This Assurance shall have no effect against the State if it is not approved by the Court.

12.12 Nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State and the people of the State of Tennessee. In addition, this Assurance shall not bar the State or any other governmental entity from enforcing other laws, regulations or rules against Respondent relating to any of Respondent's practices, including those alleged in this Assurance and the State's Petition.

12.13 This document shall not be construed against the Adrafter@ because both parties participated in the drafting of this document.

12.14 Nothing in this Assurance constitutes an agreement by the State of Tennessee concerning the characterization of the amounts paid hereunder for the purposes of any proceeding under the Internal Revenue Code or any state tax laws.

XIII. COMPLIANCE WITH OTHER LAWS

13.1 Nothing in this Assurance and Order shall be construed as relieving Respondent from complying with any state or federal law(s), regulation(s), or rule(s) nor shall any of the provisions of this Assurance and Order be deemed to be permission to engage in any acts or practices prohibited by such law(s), regulation(s) or rule(s).

XIV. FILING OF ASSURANCE

14.1 Immediately upon the execution of this Assurance, the Attorney General or his designated representative shall prepare and file in the Chancery Court for Davidson County a Petition, Agreed Order and this Assurance for the Court's approval. Respondent hereby waives any and all rights which it may have to be heard in connection with judicial proceedings upon said Petition. Respondent agrees to pay all court costs of filing such Petition, Assurance and Agreed Order. The Assurance, annexed to the Agreed Order, is made a part of and is incorporated into the Agreed Order upon approval of the Court.

XV. NOTIFICATION TO STATE

15.1 Any notices required to be sent by this Assurance shall be sent by United States mail, certified mail return receipt requested or other nationally recognized courier service that provides for tracking services and identification of the person signing for the document.

The documents shall be sent to the following addresses:

For the State: For the Respondent:

Carolyn U. Smith Steve Anderson Assistant Attorney General Cordova Athletic Club, LLC

Office of the Attorney General 7950 Club Center Cove Consumer Protection Division Cordova, TN
38018

425 Fifth Avenue North, 2nd Floor

Nashville, TN 37243

XVI. APPLICABILITY OF ASSURANCE TO RESPONDENT

AND ITS SUCCESSORS

16.1 Respondent agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Assurance shall apply to Respondent, as well as their agents, assigns, representatives, employees, successors, sales staff and any other persons or entities acting directly or indirectly on their behalf.

XVII. WAIVER OF COUNSEL

17.1 Respondent acknowledges that it has been advised of its right to consult with or otherwise retain legal counsel in connection with this Assurance. If Respondent does not consult legal counsel, it expressly waives its right to do so.

XVIII. COSTS

18.1 All costs associated with the filing and distribution of this Assurance and any other incidental costs or expenses incurred thereby shall be borne by Respondent. No costs shall be taxed against the State as

provided by Tenn. Code Ann. § 47-18-116. No discretionary costs may be taxed against the State.